BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-9647
File: 47-468605 Reg: 16084014

LILI WANG,
dba Chef Liu
236 Castro Street,
Mountain View, CA 94041-2803,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: July 12, 2018
South San Francisco, CA

ISSUED AUGUST 2, 2018

Appearances: *Appellant*: Rohit Chhabra as counsel for Lili Wang, doing business as Chef Liu.
Respondent: Sean Klein as counsel for the Department of Alcoholic Beverage Control.

OPINION

Lili Wang, doing business as Chef Liu (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending her license for 20 days because her employee sold alcoholic beverages while the license was under suspension, a violation of Business and Professions Code section 23300, and for a concurrent 10 days because she sold alcoholic beverages other than beer for consumption on the premises while the premises were not regularly in use as a bona fide eating place, in violation of Business and Professions Code sections 23038 and 23396.

1. The decision of the Department, dated March 30, 2017, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general bona fide eating place license was issued on October 14, 2008. On September 3, 2015, the Department filed a prior accusation alleging appellant had not run the premises as a bona-fide eating place.[2] The accusation was resolved by stipulation and waiver, with a penalty of 10 days' suspension to be extended indefinitely until the premises complied with Business and Professions Code section 23038. On January 15, 2016, the Department issued a decision incorporating by reference the terms of the stipulation and waiver.

On April 4, 2016, the Department filed the instant two-count accusation against appellant. Count 1 alleged that on or about February 5, 2016, appellant's employee, James Freeman, sold alcoholic beverages while the license was under suspension for the previous disciplinary action. Count 2 alleged that on or about the same date, appellant sold or served alcoholic beverages other than beer for consumption on the premises while the premises were not regularly and in a bona fide manner kept open for the serving of meals.

At the administrative hearing held on September 7, 2016, documentary evidence was received, and testimony was presented by Agent Brandon Knott of the Department of Alcoholic Beverage Control; by Ruddy Wang, appellant's son and employee; and by Tess Brooks, a Program Technician for the Department of Alcoholic Beverage Control.

Testimony established that on January 26, 2016, Agents Knott and Elvander went to the licensed premises to post its suspension for the prior violation described

2. File No. 47-468605, Reg. No. 15083015.

above. Agent Knott met with Ruddy Wang[3] at the premises and informed him the suspension would begin that day. Agent Knott had been a Department agent for approximately 11 years and had posted at least 15 of this type of suspension, which runs indefinitely until it is confirmed that the premises is operating as a bona-fide eating place. Agent Knott informed Wang that he could not sell alcoholic beverages until the premises was re-inspected and approved by the Department. Agent Knott indicated to Wang that re-inspection by the Department to ensure the premises was running as a bona-fide eating place was not a complicated process. Agent Knott indicated that if, upon inspection, the premises was determined to be a bona fide eating place, the suspension would be lifted, the suspension notices taken down, and the license certificate returned to the premises. Agent Knott did not tell Wang the premises could re-open on February 5, 2016. Wang signed for and was given a copy of ABC form 145-A, a "Rule 108 Notice of Suspension Form." The form indicates the suspension was to be for "10 days and indefinite until compliance w/23038 BP." Wang and Agent Knott had an extended discussion regarding related aspects of the premises operations and Wang even mentioned at least one other licensed business in the area that might not be running as a bona-fide eating place. Agent Elvander posted the suspension notices throughout the premises, and that began the first day of suspension.

From January 26, 2016 through February 4, 2016, appellant served 10 days of suspension of license privileges. The suspension, not having been lifted or otherwise modified by the Department, was still in effect on Friday, February 5, 2016.

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3. Ruddy Wang shares a surname with his mother, Lili Wang, who is the licensee. Throughout this decision "Wang" refers to Ruddy Wang and "appellant" refers to Lili Wang.

As of early in the day of February 5, 2016, Wang believed that, based on discussion with his mother, the appellant, regarding the prior accusation penalty and what he understood Agent Knott told him on January 26, 2016, the 10-day suspension was a fixed-term suspension, not an indefinite suspension. Wang testified that he recalled that on January 26, 2016, Agent Knott confirmed the suspension would terminate on February 4, 2016, and that he could resume license privileges as of 12:00 a.m. on February 5, 2016.

In the late morning of February 5, 2016, Wang placed some phone calls to the Department's San Jose District Office to reach Agent Knott to indicate the suspension was over and to address the return of appellant's license. After not hearing back from Agent Knott, Wang traveled to the San Jose District Office to see if he could personally obtain the return of appellant's license certificate.

Once at the Department District Office, Wang inquired of Department Technician Tess Brooks, a 24-year Department employee, about the return of appellant's license certificate. Brooks inquired with Karen Neilson, the Agent in Charge of the San Jose Office, about Wang's request. Neilson told Brooks to inform Wang that the suspension remained in effect until the Department re-inspected the premises. Brooks conveyed that message to Wang. Wang still requested to speak with Agent Knott. However, Agent Knott's shift for that day had not yet begun, and he was therefore not in the office. Wang left the District Office without appellant's license certificate. Later that afternoon, he placed an additional phone call to the San Jose District Office in an attempt to contact Agent Knott. Wang did not have any communication with Agent Knott until later that evening when Agent Knott went to the licensed premises to inspect it.

When Wang arrived back at appellant's premises, despite what he had been told at the District Office, he nevertheless considered the 10-day suspension to be completely served and over. He began taking steps necessary to re-open the premises, including removing the license suspension notices that had been posted by the Department agents on January 26, 2016. Wang testified the premises was prepared to cook and serve hamburgers, french fries, chicken tenders, and chicken wraps. Most of those were kept in the kitchen freezer until an order for them was placed by a patron. As appellant was coming off a term of suspension, Wang did not anticipate high food sales volume, and so had only a minimal supply of food items on hand. The deep fryer was operational, as were the stove, refrigerators, and freezer. Wang and another employee, "Praveen," were scheduled to work as cooks that night.

Although the premises was normally scheduled to open at 3:00 p.m., Wang delayed the opening until 6:00 p.m. to see if Agent Knott would call back. At approximately 6:00 p.m. on Friday, February 5, 2016, Wang opened the premises lounge for business though he had neither discussed the status of the suspension with Agent Knott nor received appellant's license certificate. Through appellant's bartender, James Freeman, appellant permitted the sales, service, and consumption of beer and distilled spirits in the lounge portion of the premises.

Later that Friday, which was the beginning of Super Bowl weekend, at approximately 7:45 p.m., Agents Knott, Johns, and Elvander arrived at the licensed premises to inspect it to see if it was in compliance as a bona-fide eating place and, if so, lift the indefinite suspension. Agent Knott observed the suspension notice was removed from the Castro Street side of the premises, nearest the dining room. Agent

Knott attempted to enter the dining room portion of the premises but the door was closed and locked. He went to the opposite side of the premises and entered the lounge area through its exterior door. Approximately 10 patrons were there consuming beer and distilled spirits. No food, silverware, or other condiments were seen in that area. Agent Knott then went with the bartender down the connecting hallway, past the kitchen, to the dining area where Agent Knott made contact with Wang. When Agent Knott asked why the premises bar was open when the restaurant was not open, Wang indicated he was waiting for his cook to arrive.

The dining area of the premises was closed, unoccupied, and dimly lit. There was no sign of food, silverware, or indicia of food service. Its primary exterior public doorway was closed and locked.

Agent Knott inspected the kitchen. In the freezer he found hamburger patties, which appeared freezer burned, and hamburger buns. In a refrigerator he found a single head of wilted iceberg lettuce and a head of romaine lettuce. He saw only a gallon container of ketchup and no other condiments. He saw a stack of approximately 20 dinner plates and some cooking utensils. A deep fryer and stove were there, but turned off. No actual cooking was occurring in the kitchen. However, the kitchen as a whole otherwise appeared relatively clean and usable.

Just as Agent Knott asked Wang how he was going to cook food in the kitchen, appellant's counsel appeared at the premises and advised Wang not to speak with the agents any further. Wang complied with his attorney's advice.

As Agent Knott did not deem the premises in compliance with Business and Professions Code section 23038 because it was neither operating nor ready to operate

as a bona-fide eating place, he conferred with his supervisor via phone regarding what should occur next. After conferring, Agent Knott advised Wang the suspension would remain in effect until a future inspection and that Wang must stop serving alcoholic beverages to his customers. Wang then cleared the premises of the patrons that were in the lounge area. Agent Knott told Wang that he or another Department representative would be back on February 9, 2016 to re-inspect the premises, and that if it was then running as a bona-fide eating place, the suspension would be lifted.

On or about February 9, 2016, a further inspection by Department agents found the premises in compliance as a bona-fide eating place, the indefinite suspension was lifted, and the premises resumed business operations.

Since this incident, respondent has modified or refined her menu to feature certain specialty hamburgers, side dishes, bento box meals, flavored teas, and non-alcoholic beverages.

No evidence was presented to indicate that since the suspension was lifted on or about February 9, 2016, the premises was not operating as a bona-fide eating place.

After the hearing, the Department issued a decision determining the violations charged were proved and no defense was established.

Appellant then filed this appeal contending (1) the Department improperly conflated roles and engaged in illegal ex parte communications when Department counsel Matthew Botting participated in an in camera review of the personnel records obtained pursuant to appellant's *Pitchess* motion; (2) the Department improperly conflated roles and engaged in illegal ex parte communications when Department counsel Matthew Botting rejected the ALJ's proposed decision; (3) the ALJ failed to

make a finding regarding Agent Knott's credibility despite effectively finding that he misrepresented evidence as to the operability of the deep fryer; and (4) the Department abused its discretion by not adopting ALJ Sakamoto's proposed decision based on the claim that aggravating factors canceled out mitigating factors. The first and second issues will be discussed together.

DISCUSSION

I

Appellant contends the Department improperly "conflated the roles of advocate and decisionmaker." (App.Br., at pp. 4, 10.) She argues it was improper for the Department's General Counsel, Matthew Botting, to first represent the Department during in camera review of documents produced pursuant to appellant's *Pitchess* motion[4] and then later act as delegate of Acting Director Ramona Prieto and reject the ALJ's proposed decision. (App.Br., at pp. 5-12.) Appellant writes:

> [O]n November 21, 2016, General Counsel Matthew Botting signed a certificate of decision in which he notified [appellant] that the Department decided not to adopt ALJ Sakamoto's Proposed Decision, under Bus. & Prof. [Code] §11517(c)(2)(E). In a communication dated January 12, 2017, Mr. Botting advised [appellant] to submit arguments related to penalty, clearly showing the Department's intent of having Mr. Botting as the presiding officer in the matter. However, Mr. Botting had been actively involved as a party in this matter, as early as July 22, 2016 and

4. A *Pitchess* motion is a procedure by which a party may gain limited access to otherwise confidential peace officer personnel records. (See Evid. Code, § 1043.) A *Pitchess* motion must be supported by good cause—usually an allegation that the officer in question lied or otherwise engaged in illegal conduct. (Evid. Code, § 1043(b)(3).) The goal of a *Pitchess* motion is to determine whether the officer engaged in similar misconduct in other cases, and thereby produce evidence in support of acquittal or reversal. In this case, the ALJ found good cause on the basis of appellant's allegation that Agent Knott, motivated by racial bias, lied. (Exh. 2, Order on Respondent's Motion; see also Exh. 2, Points and Authorities in Support of Motion for Discovery (*Pitchess*).) An ALJ conducted an in camera review of Agent Knott's personnel file, however, and found no relevant information. (Exh. 2, Order.)

> represented the department in a *Pitchess* motion proceeding in this matter. Further, on August 16, 2016, Mr. Botting attended the in-camera review of the *Pitchess* hearing (See ALJ Ainley's Order dated August 17, 2016). Only after Appellant's objection having [*sic*] Mr. Botting as the decision maker, Mr. Botting stopped representing himself as an authorized signatory of the Department.

(App.Br., at p. 5.) Appellant contends that because "the person authorizing the Department's decision to not adopt the ALJ's proposed order was had [*sic*] in fact represented the Department in an adversarial capacity," case law mandates reversal as "the only available remedy." (App.Br., at p. 4.)

The cases appellant cites, however, address ex parte communications between a party and decisionmaker, and not the mere conflation of roles. Appellant has therefore also filed a motion to augment the record "in furtherance to establish prima facie evidence of *ex-parte* communications in this matter." (Motion to Augment Record on Appeal, at p. 3.) The Motion to Augment is extremely broad. It encompasses two "inter-parte communications" from Botting, which were sent to both parties' counsel and to the ALJ tasked with in camera review of the documents obtained through appellant's *Pitchess* motion, as well as

> 2. Any and all *ex-parte* communications that are directly or indirectly **related to the instant matter,** including, but not limited to, reports of hearing, electronic-mail, inter-department office communications, memoranda, notes, writings, between General Counsel **Matthew Botting** and Chief Counsel Jacob L. Rambo, or Attorney Sean Klein.
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> 3. Any and all *ex-parte* communications that are directly or indirectly **related to the instant matter,** including, but not limited to, reports of hearing, electronic-mail, inter-department office communications, memoranda, notes, writings, between Acting Director **Ramona Prieto** (including her agent who signed the order and decision dated March 30, 2017) and General Counsel Matthew Botting, Chief Counsel Jacob L. Rambo, or Attorney Sean Klein.

(Motion to Augment Record on Appeal, at pp. 1-2, emphasis in original.) According to appellant, incorporating these documents into the record will reveal illegal ex parte communications that she alleges necessarily exist by nature of the Department's structure:

> [S]ince the Department's executive staff, including Chief Counsel Rambo and General Counsel Botting were involved in this matter, it is reasonable to believe that the decision maker could not have made an independent assessment, without consulting with the upper echelons in the department. Furthermore, when the top brass of the legal department gets involved in a matter, a basic question of fairness arises since reasonably no department employee would challenge the assertions of their superiors, and arguably the acting director, *who is not a lawyer*, further relies on the assessment of her general counsel for legal decisions.

(Motion to Augment Record on Appeal, at p. 3, emphasis in original.)

Appellant further insists that "[r]easonably, at some-point [*sic*] prior to July 22, 2016, there must have been an *ex parte* communication between Mr. Klein and Mr. Botting regarding the procedural and substance of the case" as otherwise "Mr. Botting would not have been able to argue the alleged procedural defects" in the *Pitchess* hearing or "object to the relevancy of any information during the in camera review." (App.Br., at p. 7.)

The Department counters that there was no ex parte communication on substantive issues in this case, and that appellant relies on speculation and leaps in logic to contend otherwise. (Dept.Br., at pp. 5-9.)

The Administrative Procedure Act (APA) contemplates, and the courts have approved, the consolidation of prosecutorial and adjudicative functions within so-called "unitary agencies" such as the Department. As the Supreme Court observed in *Quintanar*,

> The Department is a unitary agency with the exclusive authority to license the sale of alcoholic beverages in California and to suspend or revoke licenses. (Cal. Const., art. XX, § 22.) As a unitary agency, it carries out multiple functions: "It is in the nature of administrative regulatory agencies that they function both as accuser and adjudicator on matters within their particular jurisdiction. Administrative agencies are created to interpret and enforce the legislative enactments applicable to the field in which they operate. That role necessarily involves the administrative agency in both determining whether a licensee is in violation of the law, and taking action to correct such violations."

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Quintanar*) (2006) 40 Cal.4th 1, 4 [50 Cal.Rptr.3d 585], quoting *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*ALQ Corp*.) (1981) 118 Cal.App.3d 720, 726-727 [173 Cal.Rptr. 582].)

Communication within a unitary agency, however, is not without constraints. As the *Quintanar* court noted, principles of fairness demand that "the functions of prosecution and adjudication be kept separate, carried out by distinct individuals," and that the Administrative Procedure Act "adopts these precepts by regulating and strictly limiting contacts between an agency's prosecutor and the officers the agency selects to preside over hearings and ultimately decide adjudicative matters." (*Quintanar*, *supra*, at p. 4.)

Section 11430.10 of the Government Code prohibits ex parte communications:

> (a) While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.
>
> (b) Nothing in this section precludes a communication, including a communication from an employee or representative of an agency that is a party, made on the record at the hearing.

Section 11430.70 extends the prohibition on ex parte communications to agency heads:

> (a) Subject to subdivisions (b) and (c), the provisions of this article governing ex parte communications to the presiding officer also govern ex parte communications in an adjudicative proceeding to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

The *Quintanar* court reinforced the language of section 11430.70 and further held that ex parte communications are forbidden not only during the trial stage, but at any point in the course of adjudication, including the decision making phase. (*Quintanar*, *supra*, at pp. 11-14.) *Quintanar* involved hearing reports, prepared by Department counsel following the hearing, which summarized the issues in the case and recommended a particular disposition. (*Id*. at p. 6.) These reports were provided to the Department's chief counsel, who is an adviser to a decisionmaker equipped with the authority to accept or reject the ruling submitted by the ALJ. (See *ibid*.) These reports, however, were not supplied to the licensees, nor were licensees given the opportunity to respond. (*Ibid*.) The reports and the recommendations contained in them were wholly secretive. On appeal, the Department acknowledged the existence of the hearing reports, but refused to supply copies to this Board, citing attorney-client privilege. (*Id*. at pp. 6-7.) The court held that the reports constituted an illegal ex parte communication. "[T]he APA sets out a clear rule: An agency prosecutor cannot secretly communicate with the agency decision maker or the decision maker's advisor about the substance of the case prior to issuance of a final decision." (*Id*. at p. 10.)

Notably, *Quintanar* closed with an observation that the Department's post-hearing reports were, in fact, permissible, provided the Department complied with the requirements of section 11430.50:

> The APA bars only advocate-decision maker ex parte contacts, not all contacts. Thus, for example, nothing in the APA precludes the ultimate decision maker from considering posthearing briefs submitted by, and

> served on, each side. The Department if it so chooses may continue to use the report of hearing procedure, *so long as it provides licensees a copy of the report and the opportunity to respond*. (Cf. § 11430.50 [contacts with presiding officer or decision maker must be public, and all parties must be afforded opportunity to respond].)

(*Id.* at p. 17, emphasis added.)

In short, the mere allegation of a general "conflation of roles," without evidence of prohibited conduct, is not a violation of due process. Absent evidence to the contrary, the Department is entitled a presumption that its conduct was proper. (See Evid. Code, § 664 ["It is presumed that official duty has been regularly performed."].)

Appellant first contends that the Department "clearly conflated the roles of attorney and decision maker." (App.Br., at p. 4.) Appellant argues that it was improper for General Counsel Botting to "authoriz[e] the Department's decision to not adopt the ALJ's proposed order" when he had earlier "represented the Department in an adversarial capacity." (*Ibid.*)

As support, appellant relies on *Chevron Stations*. (App.Br., at p. 5, citing *Chevron Stations, Inc. v. Alcoholic Bev. Control Appeals Bd.* (2007) 149 Cal.App.4th 116, 122-123 [57 Cal.Rptr.3d 6].) That case, however, addressed the alleged existence of illegal ex parte hearing reports identical to those produced in *Quintanar*. (*Id.* at pp. 121-122.) It did not address a circumstance where, as here, one individual is alleged to have fulfilled two conflicting roles. (See generally *ibid.*) Insofar as appellant's allegations of impropriety against Botting individually are concerned, *Chevron Stations* is unhelpful.

Moreover, there is no support in the record for appellant's claim that Botting was either a decisionmaker or played an adversarial role in appellant's disciplinary action. Appellant first claims Botting was "actively involved as a party in this matter" and "represented the department in a *Pitchess* motion proceeding." (App.Br., at p. 5.) In fact,

the Department prosecutor, Sean Klein, represented the Department in opposing appellant's *Pitchess* motion. Botting's only role involved production of Agent Knott's disciplinary records for in camera review by an ALJ, pursuant to appellant's successful *Pitchess* motion. For that purpose, Botting acted as counsel for the Department in its administrative role—specifically, as Agent Knott's employer and custodian of his personnel records—and not as a prosecutor.

Appellant further claims that "Botting signed a certificate of decision" rejecting the ALJ's proposed decision and "advised [appellant] to submit arguments related to penalty." (*Ibid*.) According to appellant, these actions "clearly show[] the Department's intent of having Mr. Botting as the presiding officer in the matter." (*Ibid.*) Appellant claims that Botting "stopped representing himself as an authorized signatory of the Department" only after appellant objected. (*Ibid.*)

There is no evidence whatsoever that Botting acted as a "presiding officer." Botting may indeed have acted as an "authorized signatory of the Department"; during the decision making phase, he acted as a counsel for and delegate of Acting Director Prieto, who, as agency head, was authorized to reject the proposed decision and decide it based on an independent review of the record. (See Gov. Code, § 11517(c).) A cursory review of the record shows that it was Prieto who decided the case, not Botting. (See Decision Under Government Code Section 11517(c), at p. 2.) Nor was it improper for Botting to advise Prieto in her role as decisionmaker; as noted above, Botting did not participate in the prosecution of appellant's case. His role in the *Pitchess* in camera review was limited and entailed only the Department's compliance with an order to produce administrative personnel records.

Appellant has failed to establish that the Department allowed Botting to fulfill conflicting roles. Moreover, no law prohibits the broad consolidation of prosecutorial and adjudicative functions characteristic of a unitary agency. Appellant's claim that the Department improperly conflated prosecutorial and adjudicative roles lacks merit.

Appellant next contends that the Department "must have" engaged in ex parte communications. (App.Br., at p. 7.) Appellant argues that absent ex parte communication, Botting would not have been able to "argue the procedural defects" of the *Pitchess* motion. Botting, however, was legal counsel for the Department in its administrative capacity—that is, as Agent Knott's employer. He was properly noticed on the Order granting appellant's *Pitchess* motion. (Exh. 2, Order on Respondent's Motion, Aug. 9, 2017, at p. 4.) All the information appellant claims Botting obtained via ex parte communications with prosecutor Klein was, in fact, laid out in that Order. (See *ibid.*) Appellant's claim that an ex parte communication must have taken place is negated by the record.

Moreover, there is no evidence in the record of the extent to which Botting ultimately argued procedure. Regardless, ex parte communications are prohibited only on the substance of the case, not on procedural matters. (Gov. Code, § 11430.20; *Quintanar*, *supra*, at p. 10.)

Appellant cites no further evidence in the record in support of her claim that the Department engaged in illegal ex parte communications. Instead, she submits a Motion to Augment the Record on Appeal, essentially seeking additional discovery in the hopes of unearthing evidence of illegal ex parte communications within the Department's chain of command. (See Motion to Augment Record on Appeal, at p. 3 ["[I]t is reasonable to

believe that the decision maker could not have made an independent assessment, without consulting with the upper echelons in the department."].)

By law, the Board "shall not receive evidence in addition to that considered by the department." (Cal. Const., art. XX, § 22.) The Board's review is limited to "the record of the department" and "any briefs which may be filed by the parties." (Bus. & Prof. Code, § 23083.) However, the Board may also review "whether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department." (Bus. & Prof. Code § 23084.) Where the Board finds such evidence, it may order the case remanded for consideration of the new evidence. (Cal. Const., art. XX, § 22.) Finally, where a party seeks admission of new evidence, it must follow the procedures outlined in the Board's rules, including a description of the "substance of the newly-discovered evidence" and the "nature of any exhibits to be introduced." (Cal. Code Regs., tit. 4, § 198.)

Appellant first seeks admission of two known documents, both of which are emails sent by Matthew Botting regarding the Department's obligations under appellant's *Pitchess* motion. (See Motion to Augment the Record on Appeal.) Appellant does not contend that either of these two emails are prohibited ex parte communications—nor could she, since it is undisputed that a copy of each email was sent to the Department's prosecuting attorney, Sean Klein, and to appellant's counsel. (See Gov. Code, § 11430.10.) These emails neither support appellant's claim of ex parte communication nor show other illegal conduct. Simply put, they are irrelevant to allegations of ex parte communication. We cannot permit them to be added to the record for that purpose, and we decline to consider them on appeal.

The Motion also seeks extensive disclosure of potentially numerous unknown documents, including "any and all ex parte communications," related "directly or indirectly" to appellant's disciplinary action, between General Counsel Botting, Acting Director Prieto or her agent, Chief Counsel Rambo, and prosecuting counsel Sean Klein. (Motion to Augment the Record on Appeal, at pp. 2-3.) Appellant does not direct this Board to any specific communication. Instead, she relies on the affidavit of her counsel, Rohit Chhabra, who claims that he "reasonably, in good faith, believe[s] *ex parte* communications between Mr. Botting and Attorney Sean Klein and/or Chief Counsel Rambo occurred regarding this matter." (Motion to Augment Record on Appeal, Declaration of Rohit Chhabra, at p. 5.) The Motion, however, extends well beyond any isolated discussions between Botting, Klein, and Rambo on any specific subject, and instead encompasses "any and all" communications among those three individuals *and* Acting Directory Prieto or her agent on anything related "directly or indirectly" to appellant's case. (See Motion to Augment Record on Appeal, at pp. 1-3.) This is not evidence; it is a fishing expedition fueled by speculation.

It is true that in *Chevron Stations*, the court reversed based on the appellant's contention—without specific proof—that the Department had produced an illegal ex parte hearing report comparable to those addressed in *Quintanar*. (*Chevron Stations, Inc.*, *supra*, at pp. 121-122.) Instead, the appellant relied on evidence that such hearing reports were standard Department practice. In the initial appeal before this Board, the Department did not dispute the existence of a hearing report or argue a change in practice, but instead claimed that there was no due process violation because the Department had adopted the proposed decision without changes. (*Id.* at p. 122.) The

Board accepted the Department's position and affirmed. (*Ibid.*) The court of appeal, however, held that evidence of the Department's standard practice was sufficient to establish a prima facie case of an APA violation, and to shift the burden of disproving the violation to the Department. (*Id.* at p. 130.)

In this case, there is no evidence of standard practice. The lack of evidence is emphasized by the vast scope of the documents appellant demands in her Motion to Augment the Record on Appeal. Indeed, appellant appears to have little sense of the nature or substance of the documents she seeks, and demands even undeniably legal, privileged communications be produced and added to the administrative record.[5] We therefore reject appellant's Motion to Augment the Record on Appeal in its entirety.

Absent evidence to the contrary, the Board must presume the Department acted in accordance with the law. (See Evid. Code, § 664.) Ultimately, appellant's claim that the Department engaged in illegal ex parte communications depends on nothing more than the unsupported belief that *somewhere* in the Department, *someone* must have broken the law. Suspicion and speculation do not constitute evidence. Appellant has failed to make a prima facie case of illegal ex parte communication.

II

Appellant contends the ALJ failed to make a finding regarding Agent Knott's credibility, including his "veracity or bias against" appellant, despite agreeing with

5. Substantive communications between Klein and Chief Counsel Rambo, for example, are privileged and cannot constitute ex parte communications, since both attorneys served in a prosecutorial role. Similarly, communications between Botting and Acting Directory Prieto—even on the substance of appellant's case—are legal and privileged. These communications nevertheless fall squarely within the scope of appellant's Motion to Augment. (See Motion to Augment the Record on Appeal, at pp. 1-2.)

appellant's "key argument" that the deep fryer was operational. (App.Br., at p. 12.) Appellant directs this Board to testimony from Agent Knott, who claimed there was no oil in the deep fryer on February 5, 2016, the day of the alleged violation. (App.Br., at p. 13.) Wang, appellant's son and employee, disputed Agent Knott's testimony, and testified that there was oil in the fryer. The ALJ ultimately found that the fryer was "operational" on the date of the alleged violation. (Findings of Fact, ¶ 15.) According to appellant, "If the deep fryer was operational as correctly found by ALJ Sakamoto then Agent Knott repeatedly misrepresented evidence (and fabricated his testimony) in an attempt to provide a showing that the kitchen was not a bona fide eating place." (App.Br., at p. 13.) She contends this shows "bias or malice" on the part of Agent Knott sufficient to undermine the whole of his testimony and mandate reversal of the decision. (*Ibid.*)

This Board is bound by the factual findings in the Department's decision as long as those findings are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].) Where there are conflicts in the evidence, the Board is bound to resolve them in favor of the Department's decision, and

must accept all reasonable inferences in support of the Department's findings. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].)

Moreover, it is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with credibility determinations absent a clear showing of abuse of discretion.

At the administrative hearing, Wang and Agent Knott offered conflicting testimony regarding whether there was oil in the fryer on the night of February 5th, the day the premises were allegedly operating in violation of the license suspension terms.

Agent Knott testified the deep fryer "was off and did not contain oil." (RT at p. 35.) He stated that Wang had told him "he was in the process of changing out the oil because the oil was dirty." (RT at p. 30.) He authenticated the photographs he took of the fryer. (RT at pp. 35; see also Exh. 5.) On cross-examination, counsel for appellant suggested Agent Knott had testified to the opposite—that is, that the fryer *did* contain oil—and Agent Knott corrected him:

> [BY MR. CHHABRA:]
>
> Q. You earlier mentioned in your testimony that there was oil in the fryer and Mr. Wang stated—
>
> A. No oil in the fryer.
>
> Q. —that it needed to change?

A. There was no oil in the fryer, sir. I stated that there was no oil in the fryer.

MR. CHHABRA: Your Honor, could we have the statement read from the transcript?

(Whereupon, the record was read back.)

[BY MR. CHHABRA:]

Q. So you earlier mentioned that there was oil.

A. I think she read back that I said there was no oil in the fryer.

Q. So how could he be changing the oil if there was no oil in the fryer?

A. That is what he told me, that he was in the process of changing it, meaning emptied out the oil so there was no oil left in the fryer because it was dirty. So he needed to add more new oil in.

(RT at pp. 49-50.) Also on cross-examination, Agent Knott repeated his belief that the photographs accurately showed no oil in the fryer. (RT at pp. 52-54.) Finally, Agent Knott emphasized the overall condition of the kitchen:

[BY MR. CHHABRA:]

Q. And you mentioned in your report that the kitchen was clean?

A. It appeared pretty clean to me, yeah.

Q. And the kitchen had a functional stove?

A. Yes.

Q. The kitchen had a functional oven?

A. Yes.

Q. The kitchen had a functional wok?

A. Uh-huh.

Q. And the kitchen also had a functional deep fryer?

A. To be honest, I don't know if any of this was functional. It appeared functional. It appeared that the gas lines were—I didn't have [Wang] turn

> everything on for me. It appeared clean and functional for me. That was sufficient for me.

(RT at pp. 54-55.)

Wang, on the other hand, testified that the fryer *did* contain oil on the night of the alleged violation. (RT at p. 122.) He further testified that he could see oil in the fryer in the photographs Agent Knott took. (RT at pp. 122-123.) He stated he was not planning to change the oil on the day of the alleged violation, and made no such statement to Agent Knott. (RT at p. 124.) Additionally, appellant submitted her own photograph of the fryer without oil for comparison. (Exh. B.)

Based on this conflicting testimony, the ALJ made the following findings of fact regarding the condition of the premises kitchen on February 5, 2016:

> 15. When Wang arrived back at Respondent's premises . . . [h]e began taking steps necessary to re-open the premises, including removing the license suspension notices that had been posted by the ABC agents on January 26, 2016.[fn.] Wang testified the premises was prepared to cook and serve hamburgers, french fries, chicken tenders, and chicken wraps. Most of those were kept in the kitchen freezer until an order for them was placed by a patron. As Respondent was coming off a term of suspension, Wang did not anticipate a high food sales volume, so had only a minimal supply of food items on hand. The deep fryer was operational, as was the stove, refrigerators, and freezer. Wang and another employee, "Praveen", were scheduled to be cooks that night. (Exhibit F.)
>
> [¶ . . . ¶]
>
> 19. Agent Knott inspected the kitchen. (Exhibit 4, attachment 4) In the freezer he found hamburger patties, which appeared freezer burned, and hamburger buns. (Exhibit 4, attachment 5) In a refrigerator he found a single head of wilted iceberg lettuce and a head of romaine lettuce. He saw only a gallon container of ketchup and no other condiments. He saw a stack of approximately 20 dinner plates and some cooking utensils. A deep fryer and stove were there, but turned off. No actual cooking was occurring in the kitchen. However, the kitchen, as a whole, otherwise appeared relatively clean and usable.

(Findings of Fact, ¶ 15, 19.) The ALJ made no specific finding as to whether there was oil in the fryer. (See generally Findings of Fact.)

These findings played no role in the ALJ's decision to sustain count 1. (See Conclusions of Law ¶¶ 8-11.) With regard to count 2, however, the ALJ reached the following conclusions of law:

> 12. As to Count 2 of the Accusation, Respondent's license must be used in conjunction with being a bona-fide eating place. Section 23038 states, "'Bona fide public eating place' means a place which is regularly and in a bona fide manner used and kept open for the serving of meals to guests for compensation and which has suitable kitchen facilities connected therewith, containing conveniences for cooking an assortment of foods which may be required for ordinary meals, the kitchen of which must be kept in a sanitary condition with the proper amount of refrigeration for keeping of food on said premises and must comply with all the regulations of the local department of health. 'Meals' means the usual assortment of foods commonly ordered at various hours of the day; the service of such food and victuals only as sandwiches or salads shall not be deemed a compliance with this requirement. 'Guests' shall mean persons who, during the hours when meals are regularly served therein, come to a bona fide public eating place for the purpose of obtaining, and actually order and obtain at such time, in good faith, a meal therein. Nothing in this section, however, shall be construed to require that any food be sold or purchased with any beverage."
>
> 13. In this instance, at least on the date of the ABC Agents' February 5, 2016 inspection of the premises, the premises was not operating as a bona fide eating place. The premises had a very limited amount and selection of food on hand, consisting primarily of frozen hamburger patties, frozen buns, frozen chicken tenders, frozen french fries, and wraps.[fn.] There was virtually no fresh produce and associated condiments on hand. Respondent did not present evidence of a printed menu, if one existed, that was available to patrons to inform them of the food offerings. While the kitchen was otherwise relatively clean, equipped, and usable, it was not actually being used for the preparation of any meals or food for guests for compensation. Though the premises was open since 6:00 p.m., what most would consider the height of the dinner hour, there was no evidence that any meals or food of any type had actually been ordered, prepared, or served that day to any patrons prior to the Agents' visit. All of the patrons at the premises were located in the lounge/bar side of the premises where Respondent's bartender was selling, serving, and permitting consumption of beer and distilled spirits. There was no evidence any food or food service had occurred in the lounge area. The

> premises main dining area was closed, with its main Castro Street public entrance closed and locked. Even the Declaration of Kanako Takakuwa, Respondent's kitchen manager, indicated no food sales of any type were reported to her for February 5, 2016. Based upon all the evidence and reasonable inferences thereon, Count 2 of the accusation is sustained.

(Conclusions of Law, ¶¶ 12-13.)

Notably, the ALJ reached no conclusion regarding the presence or absence of oil in the deep fryer, and it played no role in his conclusion that count 2 was proved. While he concluded that the premises was "relatively clean, equipped, and usable," he found that other evidence—including the lack of a menu, limited on-hand supply of food and condiments, and absence of actual food service on the night in question—supported the count. (Findings of Fact, ¶ 13.) The point of testimonial conflict appellant highlights—the oil—was ultimately inconsequential.

Appellant nevertheless labels the presence of oil in the deep fryer a "key issue." She writes,

> Appellants have repeatedly alleged that Agent Knott had misrepresented a material fact, specifically, that the kitchen was operable and the deep fryer was functional, contrary to Agent Knott's report. . . . To this extent, Agent Knott repeatedly testified that the deep fryer was not functional since there was no oil in the deep fryer. [Citations.]

(App.Br., at p. 12.) She contends that the ALJ "in his statement of findings agreed with Appellant that 'the deep fryer was operational.'" (App.Br., at p. 13.) Finally, she argues,

> This evidence is material. If the deep fryer was operational as correctly found by ALJ Sakamoto then Agent Knott repeatedly misrepresented evidence (and fabricated his testimony) in an attempt to provide a showing that the kitchen was not a bona fide eating place pursuant to B & P Code §23038. This shows an indica [*sic*] of bias or malice on behalf of Agent Knott against Appellant.

(*Ibid.*)

There are several significant flaws in appellant's argument. First, she misstates Agent Knott's testimony. Agent Knott never testified that the fryer was not operational; he stated only that there was no oil in it. (RT at pp. 35, 49-50.) In fact, on cross-examination, Agent Knott stated that the fryer "appeared clean and functional." (RT at p. 55.) Agent Knott's testimony is not inconsistent: a fryer can be clean and functional—and indeed, "operational"—and yet lack oil.

Second, appellant grossly overstates the ALJ's findings and conclusions. He made no finding whatsoever as to whether there was oil in the fryer. He found only that the fryer was "operational." We decline to read more into the ALJ's language than he provided, particularly on a disputed point.

Third, appellant misrepresents the weight the ALJ gave this point. While the presence or absence of oil in the deep fryer was "material" insofar as it is one of many facts showing whether appellant was prepared to serve food on the night in question, it was ultimately inconsequential to the ALJ's conclusions of law. As noted above, the ALJ concluded that other evidence, such as the lack of a menu or any actual food service, proved the charge.

Finally, even if the ALJ had agreed there was oil in the deep fryer, that would not establish "bias or malice" on the part of Agent Knott. (See App.Br., at p. 13.) It would merely show that on that one narrow point, the ALJ believed Agent Knott was incorrect. Regardless, as we have already noted, the ALJ made no such finding. He simply did not address the presence or absence of oil, and he certainly did not infer any ill motive on the part of either party based on that solitary, inconsequential fact. We decline to second-guess the ALJ's findings or his reliance on Agent Knott's testimony.

III

Appellant challenges the Department's rejection of the ALJ's decision and its substitution of a greater penalty. In particular, she objects to the Department's addition of a paragraph finding "there are factors in aggravation and some minimal factors in mitigation" and that "[a]t best, the aggravation and mitigation cancel each other out." (App.Br., at p. 14, citing Penalty, ¶ 3.1.) According to appellant, this contradicts the ALJ's own language, which the Department adopted, finding that "a mitigated penalty is warranted." (App.Br., at p. 14, citing Penalty, ¶ 5.) Additionally, appellant argues the increased penalty lacks "appropriate justification." (App.Br., at p. 14.)

Appellant argues the Department's decision to increase the penalty undermines the fundamental right to a fair and impartial hearing. (*Ibid*.) She contends the Department "attempts to function as an authoritarian regime with no respect [for] the judicial process." (*Ibid*.)

The Administrative Procedure Act authorizes the Department to take a number of actions upon receipt of a proposed decision, including rejecting the proposed decision and substituting its own:

> (2) Within 100 days of receipt by the agency of the administrative law judge's proposed decision, the agency may act as prescribed in subparagraphs (A) to (E), inclusive. . . . The agency may do any of the following:
>
> > (A) Adopt the proposed decision in its entirety.
> >
> > (B) Reduce or otherwise mitigate the proposed penalty and adopt the balance of the proposed decision.
> >
> > (C) Make technical or other minor changes in the proposed decision and adopt it as the decision. Action by the agency under this paragraph is limited to a clarifying change or a change of a similar nature that does not affect the factual or legal basis of the proposed decision.

> (D) Reject the proposed decision and refer the case to the same administrative law judge if reasonably available, otherwise to another administrative law judge, to take additional evidence. If the case is referred to an administrative law judge pursuant to this subparagraph, he or she shall prepare a revised proposed decision, as provided in paragraph (1), based upon the additional evidence and the transcript and other papers that are part of the record of the prior hearing. A copy of the revised proposed decision shall be furnished to each party and his or her attorney as prescribed in this subdivision.
>
> (E) Reject the proposed decision, and decide the case upon the record, including the transcript, or upon an agreed statement of the parties, with or without taking additional evidence. By stipulation of the parties, the agency may decide the case upon the record without including the transcript.

(Gov. Code, § 11517(c)(2).)

In this case, the Department, upon receiving the proposed decision, exercised its authority and, following review of the entire record, adopted the whole of the decision with the addition of a single paragraph to the Penalty section. That paragraph, labelled 3.1, pertained to the first count of the accusation, and must be read in context:

> 2. As to Count 1, under Rule 144, the presumptive penalty for exercising license privileges while under license suspension is double the original suspension up to revocation. In this case, the Department indicated that as the initial penalty was a 10 day suspension, and indefinite thereafter, a 20 day suspension was appropriate. Respondent did not contend there was no sale while under suspension. Rather, Respondent stressed that Wang sincerely believed that, based upon discussions with his mother, the Respondent, and what Agents told him on January 26, 2016, the suspension was for a fixed 10 day term, the last day of which was February 4, 2016, as so indicated on the suspension posters. Respondent also argued that Wang made several attempts to contact ABC Agent Knott on February 5, 2016 and even traveled to the ABC Office to address return of the license certificate. Respondent contends that this shows good faith of Wang in his actions and evidences the absence of any specific intent to violate the suspension order. Respondent also argued that as the second inspection did not occur until February 9, 2016, when the suspension was ultimately lifted, Respondent effectively served 5 more days of suspension beyond the original 10 days served.

> 3. As discussed above, Respondent and Ruddy Wang did not fully comprehend the nature of the original suspension order. While Ruddy Wang may have initially believed the suspension was to end on February 4, 2016, on Friday February 5, 2016, he was personally told by ABC staff at the San Jose District Office that the suspension remained in effect until a follow up inspection by ABC Agents took place and did not obtain the Respondent's license certificate for reposting at the premises. Further, Ruddy Wang actually delayed opening the premises on February 5, 2016 waiting to hear from Agent Knot [*sic*] to discuss the suspension. This indicated Wang knew, or should have known, that the suspension had not been lifted and was still in effect. Yet, while Wang reopened the premises at approximately 6:00 p.m., he re-closed it less than two hours later when the ABC Agents informed him the suspension was still in effect. The fact that the suspension was not ultimately lifted until February 9, 2016, does not mean Respondent served an added term of suspension, it only means it took Respondent that much longer beyond the 10 day minimum term of suspension to be found in compliance as a bona-fide eating place.
>
> 3.1. As to Count 1, the Department recommended the standard discipline for exercising license privileges while the license is under suspension, pursuant to Rule 144, of twice the original suspension. In this case that would be a suspension of 20 days. As discussed above, there are factors in aggravation and some minimal factors in mitigation. At best the aggravation and mitigation cancel each other out. As such, the standard penalty is appropriate in this case.

(Penalty, ¶¶ 2-3.1.) Based on this additional paragraph, the Department increased the penalty assigned for count 1 from the ALJ's proposed 10 days the Rule 144 standard penalty of 20 days.

First, appellant is facially incorrect in her claim that the language "stands in direct contradiction" of the ALJ's determinations. (App.Br., at p. 14.) The language appellant selects, in which the ALJ states that "a mitigated penalty is warranted," pertains only to count 2 (see Penalty, ¶¶ 4-5), while the language cited above pertains only to count 1 (see Penalty, ¶¶ 2-3.1).

Second, the Department acted within its statutory authority when it rejected the ALJ's proposed decision and, based on its review of the entire record, added paragraph 3.1 and adjusted the penalty. (See Gov. Code, § 11517(c)(2).) Indeed, appellant does

not dispute that the Department properly exercised its authority under the Administrative Procedure Act. (See generally App.Br.) Instead, she focuses on the effect of that authority, and claims that it undermines a fair and impartial hearing and allows the Department to operate as an "authoritarian regime." (*Id.*, at p. 14.) Numerous courts, however, have found that an agency's rejection of a proposed decision pursuant to section 11517 does not infringe on a party's constitutional due process rights. (See, e.g., *Hohreiter v. Garrison* (1947) 81 Cal.App.2d 384, 401 [184 P.2d 323] ["It has been specifically held in this state that the mere fact that the administrative board is both accuser and judge in no way adversely affects the legal rights of the accused."], citing *Berry v. Alderson* (1922) 59 Cal.App. 729 [211 P. 836] and *Winning v. Bd. of Dental Examiners* (1931) 114 Cal.App. 658 [300 P. 866].) As an administrative Board of limited jurisdiction, we cannot and will not rule otherwise. (See Cal. Const., art. III, § 3.5.)

Appellant has shown no grounds for reversal of the Department's decision, which was properly issued pursuant to Government Code section 11517(c)(2).

ORDER

The decision of the Department is affirmed.[6]

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN MCGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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6. This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.